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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Marriage of HARVEY and  
KATHLEEN L. WILCOX.

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HARVEY WILCOX,

Respondent,

v.

KATHLEEN L. WILCOX,

Appellant,

v.

TRUDY ROBINSON,

Respondent.

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B227464

(Los Angeles County  
Super. Ct. No. NVD011333)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Frederick C. Shaller, Judge. Affirmed.

Law Office of Luigi P. Guslandi and Luigi P. Guslandi; Lenske, Lenske &  
Abramson and Bruce D. Abramson for Appellant.

Larry Epstein and Honey Kessler Amado for Respondents.

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The estate of Kathleen Wilcox (individually Kathleen and her estate as Kathleen's estate), represented in this matter by her daughter Leslie Ennis (Leslie), who appeals the trial court's judgment awarding all rights, title and interest in two community property assets to Trudy Robinson (Trudy), the second wife of Kathleen's ex-husband, Harvey Wilcox (Harvey). Leslie contends that the trial court (1) abused its discretion in denying her request for relief from laches, unjust enrichment and estoppel because Trudy had unclean hands; and (2) erred in applying the doctrine of laches because the evidence is insufficient to support its findings. As a result, Leslie argues that the trial court's judgment should be reversed and she should be awarded a 50% interest in both properties rather than 50% of their current value.

As we find no error, we will affirm the trial court's judgment.

### ***FACTUAL AND PROCEDURAL BACKGROUND***<sup>1</sup>

Kathleen married Harvey on July 7, 1961.<sup>2</sup> After nearly 27 years of marriage, they separated on May 1, 1988. During their marriage, they had two children: Leslie and Scott Wilcox (Scott).

Kathleen and Harvey owned a number of properties and businesses. The two properties of relevance here are (1) a hamburger and hot dog stand in Avalon on Catalina Island called Eric's on the Pier (Eric's); and (2) a garden center also on

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<sup>1</sup> The factual and procedural background is taken from Kathleen's two-volume appendices and four-volume Reporter's Transcript and is not in dispute.

<sup>2</sup> Although both parties are now deceased, we refer to them by use of their first names as a matter of simplicity and clarity. We also refer to all other involved individuals by their first names for consistency. No undue familiarity is intended.

Catalina Island called Wilcox Nursery (Wilcox II). The parties acquired Eric's during their marriage from the estate of Harvey's father via Harvey's mother. They purchased Wilcox II while they were married. They also owned Wilcox Landscape Nursery (Wilcox I), a nursery in Newhall, and S&W Nurseries, Inc. (S&W), a series of garden centers located in Sears stores throughout California. After their separation, they agreed that Harvey would operate and manage Eric's and Wilcox II and that Kathleen would operate and manage Wilcox I and S&W.

In early 1988, respondent Trudy, an attorney, was hired by Kathleen in her capacity as president of S&W to assist with its various legal problems including management and financial issues and lawsuits filed against it. Kathleen was a director of S&W in addition to being an officer and co-owner. Harvey, Kathleen and Scott were all named as co-defendants in several of those lawsuits.

Trudy represented S&W and Kathleen's interests only in her status as director, president and shareholder of S&W. Trudy did not represent Kathleen in her individual capacity. No retainer agreement existed between Kathleen and Trudy and Trudy never made an appearance in court on behalf of Kathleen and never gave her any personal legal advice.

After the parties separated, Harvey instructed Trudy to represent both him and Kathleen in their capacities as named directors against default in several lawsuits filed against both S&W and Wilcox I. Harvey also asked Trudy to directly assist Kathleen in several lawsuits and that he would pay any and all settlements. However, Kathleen rejected Trudy's assistance and terminated her representation of the companies. Trudy

recommended that Kathleen seek separate counsel. Kathleen later confirmed her termination of Trudy's services to S&W and Wilcox I in a letter to attorney James Marsala dated September 27, 1988.

Harvey had begun dating Trudy in late May of 1988, after he and Kathleen separated. Soon thereafter, Trudy began assisting Harvey in operating Eric's and Wilcox II.

Kathleen filed for Chapter 11 bankruptcy in October of 1990. However, she failed to include either Eric's or Wilcox II in her bankruptcy petition. Although the bankruptcy trustee was involved with Eric's and Wilcox II to some degree, the trustee ultimately turned over control of both to Harvey, without objection from Kathleen. Neither Wilcox I nor S&W survived the bankruptcy proceedings which were concluded on December 21, 1994.

Thereafter, Trudy invested substantial time and money in Eric's which was in disrepair and found in violation of a number of health codes as well as burdened by debts. Trudy contributed her own personal funds to pay off the company's debt and to make necessary repairs in order to continue operations. After Eric's was completely demolished in 1997 by the city of Avalon for renovations to the city premises shared with Eric's, the majority of equipment was replaced and the structure was completely rebuilt. While some of the renovation costs were paid with profits from Eric's, a substantial amount was paid by Trudy from her personal funds via her credit cards, a line of credit on her home and her co-signing a note with Harvey for a personal loan in the amount of \$75,000 from a family friend. Although Kathleen was aware of the

substantial renovations and Trudy's involvement with Eric's, she never contributed or offered to contribute any money or efforts to assist. Likewise, neither Scott nor Leslie assisted with the cost of reconstruction or renovation. Trudy contends that she acquired an interest in Eric's through her investment of time and money and later as Harvey's wife. Trudy further contends that Kathleen abandoned any interest in Eric's by her lack of involvement or investment for over 22 years.

Trudy also invested substantial time and money in Wilcox II. When the parties' separated, Wilcox II consisted of a termite-infested greenhouse, a rusty metal storage shed which dangerously listed to one side and a few old benches. In 1997, Trudy and Harvey purchased two new sheds, one for storage and another large enough for a showroom, office and cashier area. They built a new greenhouse and purchased new display benches. The gravel parking lot was replaced with grass, landscaping, red-brick walkways and a koi pond. These improvements cost approximately \$30,000 and the cost was paid from earnings from Wilcox II and Trudy's personal funds. Kathleen, Scott and Leslie contributed no funds toward the renovation of Wilcox II. Trudy also contends that she acquired an interest in Wilcox II through her contributions of time and money and later as Harvey's wife.

Trudy testified that Harvey was hospitalized for cancer at the end of 1995 and that he asked her to consider closing her law practice to oversee the operation of both Eric's and Wilcox II. She testified further that she agreed to do so but that it took her two and a half to three years to complete the winding up of her practice as it was an extensive and lucrative business. The practice was closed sometime in 1998 or 1999.

A judgment terminating the marriage of Kathleen and Harvey was entered on October 4, 1996. However, the judgment was for “status-only” and did not divide the marital estate. As such, the family law court reserved jurisdiction to later resolve the property issues. Harvey married Trudy on August 18, 1999.

The issue of marital property distribution remained dormant for nearly 14 years until Harvey, after being diagnosed with cancer, passed away on March 19, 2002 and Trudy commenced a Probate Will and Letters Testamentary action relative to his estate on December 5, 2002. Kathleen, who was also diagnosed with cancer and who later suffered a stroke, passed away on January 25, 2010. The probate proceedings of both estates were stayed as the family law property matter went forward through their respective representatives: Trudy for Harvey and Leslie for Kathleen.<sup>3</sup> Trudy and Leslie stipulated that Eric’s has a current value of \$113,000. They also stipulated that Wilcox II has a current value of between \$0 and \$33,000, and the trial court later found that value to be \$15,000. Leslie sought a set-aside of the transfer of both Eric’s and Wilcox II to Trudy.

The trial court determined that both Eric’s and Wilcox II were the community property of Kathleen and Harvey. The trial court also found that Harvey had breached

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<sup>3</sup> As the parties are deceased, throughout the remainder of this opinion we use the names of the individuals representing the parties’ estates instead of the names of the parties. Although Trudy is also a respondent in this case, her claims and arguments are aligned with Harvey’s estate’s claims and arguments and, thus, we do not discuss her claims and arguments separately.

his fiduciary duty to Kathleen under Family Code section 1101<sup>4</sup> when he transferred ownership of Eric's and Wilcox II to Trudy without Kathleen's consent. But, due to Trudy's substantial investment of time and money into both businesses, the trial court relying on the grounds of laches, unjust enrichment and estoppel determined it would be inequitable to set aside the transfers. The trial court rejected Leslie's request for relief on the basis that Trudy had unclean hands. It then ordered that Trudy pay Leslie one-half the value of each of Eric's and Wilcox II, for a total amount of \$64,000 (\$56,500 for Eric's and \$7,500 for Wilcox II), but that all rights, title and interest in Eric's and Wilcox II were awarded to Trudy. Judgment was entered on August 27, 2010.

Leslie timely filed a notice of appeal on September 16, 2010.

### *ISSUES ON APPEAL*

Neither Trudy nor Leslie challenges the trial court's finding that both Eric's and Wilcox II are community property. Instead, Leslie contends that the trial court (1) abused its discretion in denying the request for relief from laches, unjust enrichment and estoppel because Trudy had unclean hands; and (2) erred in applying the doctrine of

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<sup>4</sup> Family Code section 1101 states in relevant part, "(a) A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate. . . . [¶] (g) Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. The value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court."

laches because the evidence is insufficient to support its finding that Kathleen's delay was unreasonable, that she acquiesced in Trudy's claim of ownership and that Trudy suffered prejudice as a result of Kathleen's delay.<sup>5</sup> As a result, the trial court's judgment should be reversed and Leslie should be awarded a 50% interest in both properties instead of being paid 50% of their current value.

### ***DISCUSSION***

1. *The Trial Court Did Not Abuse Its Discretion in Denying the Defense of Unclean Hands*

Leslie argues that Trudy must be precluded from benefitting from the doctrines of laches, unjust enrichment and estoppel because Trudy had unclean hands.<sup>6</sup>

Specifically, Leslie asserts that Trudy, an attorney, previously had represented Kathleen

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<sup>5</sup> Leslie also contends that the trial court erred in concluding that Harvey and Trudy adversely possessed Eric's and Wilcox II because there was no unqualified and definite renunciation of Kathleen's rights. This argument is irrelevant as the trial court made no such finding. The trial court only described Kathleen's inaction in the context of Harvey's and Trudy's "adverse use and possession" of Eric's and Wilcox II. As noted above, the trial court found that both Eric's and Wilcox II were the community property of Kathleen and Harvey.

<sup>6</sup> Leslie also contends that the trial court erred in finding that Trudy would be entitled to restoration of her investments in both Eric's and Wilcox II in the event a set-aside were granted under *Lezine v. Security Pac. Financial Services* (1996) 14 Cal.4th 56. However, as Leslie states in her brief, this issue only arises in the event that the set-aside is granted. As we will affirm the trial court's ruling, we need not address the hypothetical issue of restoration.

In the opening brief, Leslie argues that Probate Code section 21350 precludes Trudy from obtaining an ownership interest in either Eric's or Wilcox II because, as the drafter of a testamentary instrument, Trudy may not participate in the benefit bestowed by that instrument. The argument relies on the assumption that the leases for both Eric's and Wilcox II are testamentary instruments. However, there is no evidence in the record showing that these leases are in fact testamentary instruments or that the trial court so found. This argument is entirely without merit.

as an individual and, as Kathleen's former counsel, owed her certain fiduciary duties under California State Bar Rules of Professional Conduct, Rules 3-300 and 3-120<sup>7</sup>. Trudy failed to comply with such rules when Trudy took a position that was allegedly adverse to Kathleen's community property interest in Eric's and Wilcox II and the resulting violations constitute unclean hands. Leslie contends further that the trial court abused its discretion in denying her request for relief as a result.

“The defense of unclean hands arises from the maxim, ‘ “ ‘He who comes into Equity must come with clean hands.’ ” ’ [Citation.] The doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim. [Citations.] [¶] . . . Not every wrongful act constitutes unclean hands. But, the misconduct need not be a crime or an actionable tort. Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient

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<sup>7</sup> California State Bar Rules of Professional Conduct, Rule 3-300 states, “A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: [¶] (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.”

California State Bar Rules of Professional Conduct, Rule 3-120 states, in relevant part, that an attorney “shall not: [¶] (1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or [¶] (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or [¶] (3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.”

cause to invoke the doctrine. [Citations.]” (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978-979.)

“The defense of unclean hands does not apply in every instance where the plaintiff has committed some misconduct in connection with the matter in controversy, but applies only where it would be inequitable to grant the plaintiff *any* relief.

[Citations.] The court must consider both the degree of harm caused by the plaintiff’s misconduct and the extent of the plaintiff’s alleged damages. [Citation.] Whether the defense applies in particular circumstances depends on the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries. [Citation.] The decision of whether to apply the defense based on the facts is a matter within the trial court’s discretion. [Citation.] [¶] A court’s discretion to grant an equitable defense such as unclean hands is not unlimited. The court must consider the material facts affecting the equities between the parties; the failure to do so is an abuse of discretion. [Citation.] If requested, factual findings concerning the nature of the misconduct and the extent of prejudice or damage to the defendant relative to the plaintiff’s damages or other requested relief may be necessary to support the court’s exercise of discretion and facilitate effective review. [Citations.] A decision based on bare ‘equity’ unsupported by established precedent and lacking evidentiary support does not disclose the proper exercise of discretion.” (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446-447.)

Leslie’s argument that Trudy violated Rule 3-300 relies entirely on her assertion that Trudy previously represented Kathleen as an individual. However, the record

contains evidence that contradicts her assertion. Trudy, in her live testimony before the trial court, repeatedly denied ever representing Kathleen in her individual capacity; she testified that she only represented the Wilcox family companies of which Kathleen was a shareholder, co-owner or officer. Leslie produced no retainer or other agreement between Kathleen and Trudy as proof that Trudy had represented Kathleen in her individual capacity. Although Leslie points to a former deposition in which Trudy appeared to state that she represented Kathleen, the testimony on the point does not support the contention. As it is undisputed that Trudy represented businesses of which Kathleen was a shareholder, co-owner or officer, the prior testimony is not necessarily inconsistent. Finally, there is no evidence in the record that Trudy ever gave Kathleen any personal legal advice.

Additionally, Leslie failed to prove that Kathleen herself believed Trudy represented her in her individual capacity. On September 27, 1988, Kathleen sent a letter to her counsel, James W. Marsala, in which she stated that “due to gross mishandling of legal matters pertaining to S & W Nurserys [sic], Inc. and Wilcox Landscape Nursery, Trudy J. Robinson is no longer legal counsel for the mentioned firms or the Wilcox Family.” She does not state that Trudy is no longer *her* personal legal counsel.

Based on the evidence that was before the trial court, it was reasonable for it to conclude that Trudy did not represent Kathleen in an individual capacity. Thus, Trudy owed no fiduciary duties to Kathleen and, as a result, could not have violated Rule 3-300.

Leslie's next contention that Trudy violated Rule 3-120 also fails. First, she cites no authority, and we have found none, supporting her assertion that a former spouse of an attorney's client has standing to pursue discipline of that attorney when the attorney begins a consensual sexual relationship with the client under Rule 3-120. Next, although Leslie argues that Trudy breached her fiduciary duty to Kathleen because Trudy violated Rule 3-120, she fails to specifically allege that Trudy violated any one of the three requirements under Rule 3-120. She did not allege that Trudy (1) required or demanded sexual relations from Harvey *incident to or as a condition of her professional services*; (2) employed coercion, intimidation, or undue influence *in entering into* sexual relations with him; or (3) continued her representation of Harvey despite incompetently performing her *legal responsibilities to him* as a result of their sexual relationship. Instead, Leslie alleges that Trudy used her sexual relationship with Harvey to "take the property interests of the other client" (i.e., Kathleen). As noted above, however, Leslie failed to prove that Trudy ever represented Kathleen in her individual capacity.

Based on the foregoing, the trial court did not abuse its discretion in denying relief to Kathleen's estate under the doctrine of unclean hands.

## 2. *Substantial Evidence Supports the Trial Court's Laches Ruling*

Leslie next argues that the trial court erred in applying the doctrine of laches because the evidence does not support the trial court's findings that Kathleen's delay was unreasonable, that she acquiesced in Trudy's claim of ownership and that Trudy suffered any prejudice as a result of such alleged delay.

The Family Code “expressly permits the defense of laches in actions in which a spouse asserts a breach of fiduciary duty that impairs community entitlements.” (*In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 752; Fam. Code, § 1101, subd. (d)(3).) “Generally, a trial court’s laches ruling will be sustained on appeal if there is substantial evidence to support the ruling. [Citation.]” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67.)

“ ‘ “The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.” ’ [Citations.]” (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1418.)

a. *Unreasonable Delay*

Although Leslie argues that Kathleen’s delay was reasonable because the marital estate was under the automatic stay of the bankruptcy court from October of 1990 until December of 1994 and thereafter both Kathleen and Harvey were diagnosed with cancer, the trial court found those arguments insufficient justification for the nearly 22-year delay in resolving the issue of Kathleen’s interest in the properties.<sup>8</sup> We agree. Kathleen and Harvey separated on May 1, 1988 and their divorce was finalized on October 4, 1996. Harvey died in 2002 and Kathleen died in 2010. There was plenty of time between the parties’ separation in 1988 and the filing of the bankruptcy petition in 1990, after the dismissal of the bankruptcy petition in 1994 and prior to Kathleen’s

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<sup>8</sup> As mentioned above, Trudy commenced a Probate Will and Letters Testamentary action relative to the estate of Harvey Wilcox on December 5, 2002 (14 years after the parties separated). There is also a deposition of Trudy in the record that was taken on April 8, 2008 for the present case. However, most of the proceedings in this case, including the trial, occurred in 2010 – 22 years after the parties separated.

death during which these issues could have been resolved. The evidence in the record supports the trial court's finding that a 22-year delay was unreasonable.

A finding of unreasonable delay alone, however, "will not support a laches defense . . . unless it works to the *disadvantage or prejudice* of other parties," which brings us to the next step of our analysis. (*Bono v. Clark, supra*, 103 Cal.App.4th at p. 1419.)

b. *Acquiescence in the Act*

Leslie contends that the evidence in the record is insufficient to show that Kathleen had acquiesced in Trudy's taking an interest in either Eric's or Wilcox II. Specifically, Leslie contends that Kathleen could not have acquiesced because she was never aware that Trudy was claiming ownership of the businesses to her exclusion. The record shows otherwise.

There is substantial evidence in the record showing that Kathleen was aware that Trudy was fully involved in the renovating, rebuilding and operating of both Eric's and Wilcox II, including Trudy's contributions of both time and money. Scott testified that, after visiting Eric's, he discussed the reconstruction with his mother. Although he could not recall specific conversations, he also testified that he had discussed the management and operation of Wilcox II with both Harvey and Trudy during dinners at his house and then later informed Kathleen of those discussions. Leslie also testified that she had discussed with Kathleen the fact that Kathleen felt she was being excluded from the management and operation of both Eric's and Wilcox II. Despite being aware of such activities, Kathleen took no steps to protect her interest in either of those properties.

This evidence supports the trial court's finding that Kathleen had acquiesced in Trudy's acquisition of an ownership interest in Eric's and Wilcox II.

Although a finding of unreasonable delay and acquiescence is sufficient to conclude that the doctrine of laches applies, we will also address the contention that Trudy was not prejudiced from Kathleen's delay.

c. *Prejudice from the Delay*

Leslie contends that "there is no evidence in the record to support the conclusion that Trudy was prejudiced by any perceived delay." We disagree. "Prejudice may be shown where the plaintiff's delay causes detriment to the defendant." (*Bono v. Clark, supra*, 103 Cal.App.4th at p. 1419.)

The record is replete with evidence that Trudy invested substantial time and money in both Eric's and Wilcox II such that it would be inequitable and to her detriment to transfer a 50% ownership interest in the businesses to Kathleen. Trudy testified that her financial investment in Eric's was over \$200,000, which covered rent arrears, reconstruction after the total demolition, new equipment purchases and other costs. She also testified that she invested substantial time and energy in compliance work and managing Eric's. Similarly, Trudy invested labor, skill and money in Wilcox II to rehabilitate the business and make it profitable. Finally, Trudy closed her law practice to devote her time to running these businesses and taking care of Harvey after he was diagnosed with cancer. All of these facts support the trial court's finding of prejudice resulting from Kathleen's delay.

Although Trudy received profits from the businesses, her contributions to both businesses far outweigh the modest profits gained. (See *Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1162-1163 [10-year delay in bringing trade dress infringement suit against defendant was found prejudicial despite the profits defendant made from sales of the product due to defendant's substantial investment of resources in developing and selling the product, which included traveling to Taiwan, producing the product, creating recipes, printing catalogues and promoting the product]; cf. *Field v. Bank of America* (1950) 100 Cal.App.2d 311, 314 [wife's delay in bringing an action to have a trust annulled and her community property restored to her was found to not prejudice defendant trustee where trustee benefitted from accrual of fees due to wife's delay].)

The evidence in the record supports the trial court's finding that Leslie's claim for a 50% interest in Eric's and Wilcox II is barred by the doctrine of laches.

***DISPOSITION***

The trial court's judgment is affirmed. Trudy Robinson and the estate of Harvey Wilcox shall recover costs on appeal.

***NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS***

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.